United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1076

To be argued by
RONALD L. GARNETT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1076

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT MUNOZ, JAMES SIMS and
CARLOS CUADRADO,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Robert Munoz and James Sims appeal from judgments of conviction entered on February 27, 1976, in the United States District Court for the Southern District of New York, after a nine week trial before the Honorable Constance Baker Motley, United States District Judge, and a jury. Carlos Cuadrado appeals from a judgment of conviction entered on January 23, 1976, in the United States District Court for the Southern District of New York, after his plea of guilty on January 27, 1975, before Judge Motley.

Indictment 74 Cr. 1168, filed on December 11, 1974, charged Robert Munoz, James Sims, Frank Sims, John Sims, Carlos Cuadrado, Cleo Williams, Warnell Vega, Eddie Jackson and Fruto Alicea with conspiracy (1) to damage property on construction sites by use of explosives,

and (2) to extort money for personal gain from contractors in violation of Title 18, United States Code, Section 371. The defendants were also charged with 27 substantive counts of using explosives, in violation of Title 18, United States Code, Section 844(i), and of extortion, in violation of Title 18, United States Code, Section 1951.* The indictment further charged Robert Munoz, James Sims and Frank Sims with one count of obstruction of justice, in violation of Title 18, United States Code, Section 1503. Prior to trial, defendants Fruto Alicea and Carlos Cuadrado pled guilty to Count One, and defendant Warnell Vega pled guilty to a charge of perjury in a related indictment, 74 Cr. 1009.

The trial of Robert Munoz, James Sims, Frank Sims, John Sims, Cleo Williams and Eddie Jackson began on October 6, 1975 and concluded on December 5, 1975, when the jury returned verdicts of guilty on the conspiracy count (Count One) as to Robert Munoz and James Sims, and not guilty on all other counts as to Munoz and James Sims and on all counts as to the other four defendants.** In response to the Court's request of the jury for special verdicts on Count One, the jury found Munoz and James Sims guilty of conspiracy both to use explosives (18 U.S.C. § 844) and to extort (18 U.S.C. § 1951).

On February 27, 1976, Judge Motley sentenced Munoz to eighteen months imprisonment, execution of sentence suspended, and two years probation, and James Sims to two years imprisonment, execution of sentence suspended,

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* One defendant, Frank Sims, was not charged in Counts 10-29, the substantive extortion counts.

** Following the Government's direct case, Counts 10, 11, 15, 21 and 26 were dismissed as to Munoz and James Sims, and various other counts were dismissed as to the other defendants, at the request of the Government.

and two years probation.* On January 23, 1976, Carlos Cuadrado was sentenced to five years imprisonment, and he is presently serving his sentence.

Statement of Facts

The Government's Case

A. Summary.

In 1972, Robert Munoz, Director of the Hunts Point Community Corporation, a federally funded anti-poverty agency in the South Bronx, and James Sims, an employee at the Hunts Point Community Corporation, organized the Black and Puerto Rican Coalition of Construction Workers ostensibly to obtain employment for unemployed neighborhood laborers in the construction industry. The Government's proof at trial showed, however, that Munoz and Sims in fact used pipe bombs, fire bombs and arson to damage construction equipment and contractors' offices, and extorted money payments from the contractors for unwanted, no-show community coordinators or liaisons.

The Government's witnesses included (1) former associates, employees or friends of the defendants; (2) officers and employees of the construction companies involved; and (3) police and bomb squad officials. Fruto Alicea was the principal witness from the first group. He testified that Munoz and Sims directed him, while he was employed by the Hunts Point Community Corporation, to plant pipe bombs on construction sites, burn company

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* On January 23, 1976, Judge Motley sentenced Fruto Alicea to five years probation, and sentenced Warnell Vega to two years imprisonment, concurrent to a ten year term of imprisonment imposed in the Eastern District of New York for violation of the narcotics laws.

trailers and fire bomb company offices. Officers and employees of the construction companies described the direct and indirect threats and demands made by Munoz and Sims, payments made by the companies to buy peace, and the damage caused to the construction sites by bombs, fires and violent demonstrations. Police officials introduced pipe bombs found on construction sites and described the damage done to property by the bombs and fires.

The testimony of the Government's forty-seven witnesses extends over 4500 pages of trial transcript and covers numerous incidents of arson, bombing and violent demonstrations. For purposes of this appeal, only the highlights of the testimony relating to the unlawful activities of Robert Munoz and James Sims are set forth below because, except for Point One in the defendants' brief, the issues raised do not deal with the substance of the Government's proof. The claim in Point One of Munoz' and Sims' brief, that the evidence was insufficient to convict, is, we submit, meritless and amply refuted by selected highlights from the testimony.* This testimony is most readily understood by treating the incidents relating to each construction company separately.

1. Sovereign Construction Company (Sovereign).

(a) Pipe bomb and fire at 149th Street site.

On March 28, 1973, a pipe bomb and fire damaged a pile driver on the Sovereign construction site at East

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* The Government prepared charts summarizing all of the testimony of the construction company witnesses for reference during summation which were marked as Court's Exhibit 17. The Government's contentions as to the proof at trial are set out in detail in the Government's summation at pages 5837-5910 of the transcript.

149th Street and Park Avenue. (Tr. 2266, 2535).* Fruto Alicea testified that James Sims and he planted the bomb on instructions from Munoz. He said that late in the evening Sims and he drove to the site, cut a hole in a fence to enter the site, placed the pipe bomb in a crane and lit the fuse on the bomb. The bomb at first did not explode, and they returned to the crane, poured gasoline on the crane and bomb, lit the gasoline and watched the fire and explosion occur.

The pipe bomb had been given to James Sims by Munoz at a meeting at the Hunts Point Community Corporation office earlier that day, and Munoz had given Alicea and Sims instructions to use the pipe bomb on the construction site.

The day after the bombing, Munoz congratulated Sims and Alicea on a "beautiful job" and paid Sims, who in turn handed Alicea $200 to $300 for the job. This was the approximate amount Alicea was paid for each of the pipe bomb and arson assignments he was to carry out. (Tr. 98-116).

(b) The Amengual payment.

Sam Amengual, President of East Electric Corporation, made a bid in early 1973 to obtain an electrical subcontract from Sovereign for a construction project on 160th Street and F.D.R. Drive. The subcontract, however, was initially awarded to another electrical subcontractor.

Amengual then enlisted Robert Munoz and James Sims to represent him in dealings with Sovereign, and, in return, Sims and Munoz demanded and received payments from Amengual. On May 9, 1973, Amengual paid Sims and Carlos Cuadrado, another member of the Black and Puerto Rican Coalition, $1,000. (Tr. 2900-07; GXs 25, 26).**

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* The abbreviation "Tr." refers to the trial transcript.

** The abbreviation "GX" refers to Government's exhibits.

That same day Munoz, Sims and Cuadrado met with Samuel Hochberger, Vice President of Sovereign, at the Sovereign office in Paramus, New Jersey, and asked why Amengual's company had not received the subcontract. Munoz stated that he would bring pressure to bear by "hits" and that they had "hit" other general contractors not working with the community and his groups. (Tr. 1960-68).

The next day, May 10th, a pipe bomb exploded on a construction rig at Sovereign's 149th Street construction site (Tr. 2270, 2279), and the same day, an unexploded pipe bomb was found on a construction pile driver at Sovereign's construction site at 101st Street and F.D.R. Drive. (Tr. 2279, 2316, 2327).

Alicea testified that Munoz had assigned him and James Sims to plant the pipe bomb on the 101st Street site. Although they lit the fuse, it did not go off, and Sims said they would leave it as a "message." (Tr. 132-38).

On May 29, 1973, a construction trailer on Sovereign's 101st Street site was burned by arson. (Tr. 2329). Alicea testified that Munoz had instructed him and Sims to go on assignment to the 101st Street site a second time, because the contractor was still giving them a hard time. Alicea and Sims went to the site at night, poured gasoline on the trailer and lit the fire. (Tr. 141-46). The day after the fire, on May 30th, Sims received a second payment of $1,000 as a "consulting fee" from Amengual. (Tr. 2908; GXs 27, 28).

On June 22, 1973, Sims demanded a third payment from Amengual. After checking with Munoz, Amengual paid Sims $700 as a "consulting fee." (Tr. 2913; GX 29). That same day, a second trailer on Sovereign's 101st Street site was burned by arson. (Tr. 2335). Alicea testified that Munoz had instructed him and Sims to return a

third time to the 101st Street site. They did so and set fire to the construction trailer. (Tr. 146-51).

Three days later on June 25th, Sims telephoned Hochberger at Sovereign and told him that he was going to "move out their troops" on the Sovereign sites and "nothing would be accomplished unless there was violence." (Tr. 1975-78). On June 29th, a pipe bomb was found on the 101st Street site (Tr. 2345), and the same day Sims met again with Hochberger and repeated his demands about jobs and the East Electric subcontract.* The next day, an unexploded pipe bomb was found outside the Sovereign office in Paramus, New Jersey, in front of Hochberger's parking space. (Tr. 1980-81). Alicea testified that under instructions from Munoz, he and Sims planted the pipe bomb at the Sovereign office in Paramus. (Tr. 187-92).

On July 3, 1973, Sovereign awarded East Electric the electrical subcontract at the Sovereign site. (Tr. 2025).

(c) Other incidents at the Sovereign sites.

On September 19, 1973, two days after a meeting between James Sims and the Sovereign construction superintendent at the 149th Street and Park Avenue site, the construction trailer at 149th Street was destroyed by arson. (Tr. 2550-51). Alicea testified that he and Sims set fire to the trailer and that, as the fire burned, they watched a security guard, whom they had not realized was inside, escape from the trailer. (Tr. 119-29).

The day after the fire, on September 20th, Munoz telephoned Hochberger and threatened to "stop the

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* Although on May 22nd, Munoz told Hochberger that the community no longer supported East Electric for the subcontract, Sims at subsequent meetings continued to press East Electric on Sovereign. (Tr. 1971).

job or call out the troops" at 149th Street to prevent Sovereign from awarding an electrical subcontract to a subcontractor who had hurt Amengual. (Tr. 2022-23). The next day 100 demonstrators from the Black and Puerto Rican Coalition converged at the site and stopped work there. (Tr. 2554).

On November 8, 1973, Sims and demonstrators entered the site at 101st Street. Sims spoke to the superintendent and requested Sovereign to hire a liaison for $300 per week "to help in avoiding future problems." (Tr. 2356-57). Sovereign refused to hire a liaison man, however, and at meetings in the months that followed, Sims threatened Sovereign with what he had done on other projects—"vandalized", "hit", "burned" and "terrorized"—if people from his group were not employed. (Tr. 2371-72).

2. S.S. Silberblatt, Inc. (Silberblatt).

On July 16, 1973, a pipe bomb exploded on a crane at the Silberblatt construction site at 123rd Street and 3rd Avenue. (Tr. 2609, 2842). Alicea testified that Munoz assigned him and Sims to a job on the 123rd Street site. Sims later told him the "job" would involve a pipe bomb. Together, Sims and Alicea went to the site, placed the bomb on a crane, poured gasoline over it, lit the gasoline, watched the fire and heard the explosion. (Tr. 155-61).

On July 20th, 40 demonstrators from the Black and Puerto Rican Coalition led by Sims stopped concrete trucks from entering the Silberblatt construction site, interrupting the concrete pour for the day. (Tr. 610).*

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* A number of contractors testified that the Coalition demonstrations which caused work stoppages were timed to interrupt a concrete pour. Since concrete must be poured over a specific area continuously, interruption of the pour could require pulling out the work already completed and starting again so there would be no joints in the concrete. (*E.g.*, Tr 2352-55, 2615).

On August 9, 1973, a second pipe bomb was planted on the 123rd Street site. (Tr. 2852, 3183). Alicea testified that Munoz sent him and Sims to the site a second time and told Sims they have to just leave it [the bomb] there as a message. The first one went off. If you have trouble with the second, just leave it there, it will be found and it will be a message." (Tr. 162).

On August 24, 1973, Munoz and Sims led a violent demonstration at the 123rd Street site, at which a concrete pour was stopped and at which work and equipment were destroyed. (Tr. 2617, 2858).

3. DeMatteis Construction Corporation (DeMatteis).

On June 22, 1973, 40 demonstrators led by Munoz and Sims entered the DeMatteis construction site at 189th Street and Crotona Avenue, and stopped work on the site. Among other demands, Sims requested that DeMatteis hire a community coordinator for the site, which the DeMatteis superintendent refused to do. (Tr. 3200-30, 3249).

On June 26, 1973, DeMatteis received a telegram from Sims, stating that the Coalition had "no alternative but to take immediate action." (GX 38). On July 10, 1973, Sims returned to the site and again spoke to the superintendent. (Tr. 3234-35).

On August 8th, there was a bomb threat on the site. The next work day, Sims telephoned the superintendent and restated his demands. (Tr. 3239). On August 11th, an unexploded pipe bomb was found under a power shovel on the site. The next day Sims again telephoned the site and stated "there will be more trouble unless DeMatteis complies with what he wants." (Tr. 3242).

Alicea planted the bomb on this site. He testified that Sims gave him two pipe bombs in the apartment of Sims' girlfriend, Migdalia Ortiz, and instructed him to place the pipe bombs, without lighting them, on the 189th Street and Crotona site. Alicea drove to the site and threw both pipe bombs onto the site. Only one of the bombs was discovered. (Tr. 166-70).

4. Diesel Construction Co. (Diesel).

On September 18, 1973, James Sims met with Stanley Orr of the Diesel Construction Co. on Diesel's Mount Sinai Hospital construction site at East 100th Street and Fifth Avenue. Sims requested that people from his organization be hired. He told Orr that his group had ways of achieving results. For example, he said, they had damaged and shut down projects in the Bronx and Manhattan, and "on occasion they would resort to the use of either pipe or fire bombs." Sims also stated that on one project his group had overturned a crane, torn down the fence, and caused a lot of malicious damage. (Tr. 3460-62).

5. Montana Construction Corp. (Montana).

In early 1973, Robert Munoz and James Sims met with Michael Montana, president of the Montana Construction Corp., and requested that he hire their people and contractors from the community to work on a Montana construction project of a Ford Agency on Bruckner Boulevard. Munoz said that if Montana refused to cooperate, his people would demonstrate, stop concrete trucks, and disable equipment as they had done on another job to a larger contractor. (Tr. 3483-91).

In the summer of 1973, Montana received a bid on an electrical subcontract for the project from Beau Elec-

tric, a subcontractor recommended by James Sims. The bid, however, was $50,000 higher than other bids and Montana told Sims the price was too high. (Tr. 3493-95, 3554). On approximately October 10, 1973, Sims telephoned Montana. Montana again stated that Beau Electric would not get the electrical contract because of the high bid. Sims responded that "we aren't going to let you work in our community and we aren't going to let another electrician on the job." (Tr. 3496). The following Monday, another electrical contractor, not Beau, began work on the job. The following Thursday night, October 18th, Montana's site was heavily damaged by vandals. Plumbing and masonary were broken, a trailer was demolished, installed piping was broken at the connections, and work was shut down on the site for three weeks. (Tr. 3497-3503, 3568-72; GX 41A-I).

After October 18th, Munoz and Sims met again with Montana. Montana asked if he would have peace on the job or continue to have problems. He was told that if he awarded the subcontract to a recommended subcontractor and hired Munoz' and Sims' guard service, he would have no further problems.

Montana subsequently hired the recommended subcontractor and guard service and had no further difficulties or communications from Munoz or Sims. (Tr. 3503-10).

6. Starrett Bros. and Eken Construction Inc. (Starrett).

In July and August, 1973, James Sims led a number of demonstrations at the Starrett construction project at 179th Street and Prospect Avenue. During one demonstration, the demonstrators, led by Sims, went to the ninth floor of a building on the project, threw kitchen cabinets out windows, and broke pipes, walls and glass.

The site superintendent notified the police and Sims yelled at him "if [you] press charges and one man goes to jail [you] will not live to leave the Bronx. . ." (Tr. 3090-99).

On September 13, 1973, Sims entered the Starrett site at 227th Street and Netherlands Avenue and said he wanted his people on the job. The superintendent refused. Sims told the superintendent that he was taking the wrong attitude and he would see what would happen. (Tr. 3158-59). The next day, on September 14th, a trailer was burned on the 227th Street site. The plans for the project and tools inside the trailer were destroyed. (Tr. 3159).

Alicea testified that he and Sims started the trailer fire on this location by pouring gasoline around the trailer and lighting the fire. (Tr. 195-97).

7. Slattery Associates, Inc. (Slattery).

On March 20, 1973, James Sims met with William Dickson, corporate secretary and counsel for Slattery Associates, and told him that there was insufficient neighborhood representation on Slattery's Hunts Point Pollution Control Plant construction project. Dickson informed Sims that ground rules for minority participation at the project had already been established. (Tr. 3300-03).

That very night a fire bomb was thrown into the front door and vestibule at Starrett headquarters in Maspeth, Queens. (Tr. 3303-04).

Alicea testified that Munoz sent him and James Sims on the assignment to the contractor's office in Queens. Sims and Alicea checked out the location the first day, and the next day Sims told Alicea to go with Sims' brother, Frank Sims, to do the "hit." First, Sims and his

brother prepared the fire bombs by pouring gasoline into a bottle and stuffing the bottle with rags to make a Molotov Cocktail. Alicea and Frank Sims then drove back to the office in Maspeth, where Frank Sims lit the bottle and threw it into the building. (Tr. 69-78).

The next day, March 21st, Sims telephoned Dickson and Dickson agreed to hire three laborers. On March 22nd, Sims telephoned Dickson again and said he, and another member of the Council of the Coalition, Larry Rego, were not satisfied. On March 23rd, Rego met with Dickson and asked Slattery to hire a community coordinator or make a cash contribution to the Coalition.

On March 30th, Munoz and Sims led a demonstration of 60 men on the Slattery project. Munoz threatened that unless there was more participation on the site, "they were going to stop the project," and have "another Wounded Knee in the South Bronx." (Tr. 3305-13). On April 2nd, James Sims and others from the Coalition met with Dickson, and Sims requested again that a community coordinator be hired. Dickson again said Slattery would not hire a community coordinator. (Tr. 3316-17).

On July 27th, Sims and Munoz met with Dickson and told him of the necessity of a community coordinator as "the price of peace in our area." (Tr. 3319).

On August 16th, Dickson notified Sims that Slattery would hire a coordinator, or pay a fee to the Coalition of $15,000 per annum, payable in quarterly installments. On August 29, 1973, March 1, 1974, May 15, 1974 and August 26, 1974, payments of $3,750 each were made by Slattery to the Coalition. These checks were deposited in various different Coalition bank accounts for which either Munoz or Sims had authority to sign checks. Within a few days of the deposit of each of the first two Slattery checks, the bulk of the money was withdrawn

from the account in checks made out to Sims signed by Munoz. (GXs 40, 66, 71; Tr. 5294-5300, 5346-50).

8. Board of Education Contractors.

(a) John T. Brady & Co. (Brady).

Between December, 1972 and March, 1973, Sims and Cleo Williams, a member of the Coalition, requested that Brady hire a community liaison man for $300 per week for the 167th and Union Avenue school construction site. Brady's superintendent, Lou Ferrari, refused and suggested they talk to the Board of Education. (Tr. 2969-78). In March, 1973, Ferrari was notified by the Board of Education that the Board would pay for the liaison man. Ferrari notified Sims and Munoz of this decision, and was told that the liaison man would be Cleo Williams. On March 30th, Brady paid the first liaison check of $300 for the week ending March 29th. (GX 32).

After two weeks, the Board of Education notified Brady that it would not continue to pay for the liaison. Ferrari accordingly notified Williams not to come back for his check.

Immediately thereafter, on April 13th, the Board of Education trailer on the construction site was burned. (Tr. 2980-87). The next day, 75 demonstrators led by Sims arrived at the site. At 11:15 a.m., Sims and others entered Ferrari's office in a construction trailer and Ferrari was told that if he failed to put the liaison man back to work, all work at the site would be stopped by 12:30 that day. The pressure continued when Ferrari was told "some demonstrators will go to the hospital and some to jail." At 12:15, Ferrari received authority from his employer to tell Sims he would put the liaison man back on the payroll, and was told by the demonstrators to make the check payable to Cleo Williams. (Tr. 2987-95).

The weekly payments to Williams continued until August 23rd, when James Sims wrote to Brady that henceforth the checks were to be made out to Frank Sims, his brother. Frank Sims continued to receive checks from Brady through October 31, 1975 even after the trial had begun and Frank Sims was in court everyday, and although work on the school site had been completed on December 27, 1974. (Tr. 3016, 3653; GXs 34, 35, 45).

Ferrari testified that he had never had a liaison man on a job before; that there was no discussion with the Coalition as to what the man would do; and that for the $300 per week Williams and Sims only occasionally came to the site and sent some men to the site to look for work. (Tr. 2976-77, 3007-09).

(b) Caristo Construction Corporation (Caristo).

On November 17, 1972, two dozen demonstrators, led by Robert Munoz, entered Caristo's school construction site at 158th Street and Tinton Avenue, broke into the field office, threw telephones through the windows, set fire to the watchman's shanty, broke windows in the inspector's trailer, tore down the fence and then left when the police arrived. Munoz told the site superintendent that "I can't control these people. They have a free hand." (Tr. 4574-80).

On March 29, 1973, after the Board of Education decided to pay, Caristo agreed to take on a liaison man from the Black and Puerto Rican Coalition at $300 per week. Carlos Cuadrado was assigned to be the liaison man, and payment of $300 per week to the Coalition continued until November 19, 1974. (GXs 48, 49). However, neither the superintendent at the site, nor the superintendent at a second Caristo school site to which the liaison was supposedly assigned, knew Cuadrado or recognized a photograph of him which was shown to them at trial. (Tr. 4558-60, 4563-64, 4567, 4579-80).

(c) Mars Associates and Normel Construction Corporation (Mars-Normel).

In the fall and winter of 1972-1973, Munoz, James Sims and other representatives of the Coalition met with Bernard Caress, general superintendent for Mars-Normel on a school construction site at Bruckner Boulevard and Colgate Avenue. Munoz told Caress about problems other contractors had on the jobs: a crane burned down and work stopped on the Caristo job; and the Brady job was having problems. Caress was asked to hire a liaison man for $15,000 a year and Munoz said that the liaison would "keep everything quiet and peaceful on the job." (Tr. 3587-92). Caress said he had no authority to hire a liaison and would let them know.

On March 16, 1973, after the Board of Education verbally agreed to repay the company, Cleo Williams was placed on the Mars-Normel payroll as liaison for $300 per week. On March 23rd, James Sims replaced Williams as liaison on the payroll. Shortly thereafter the Board of Education refused to pay for the liaison, but Mars-Normel decided to continue the payments because "it was the best thing to do." Caress testified that Williams never came on the job site while he was being paid; that as far as he knew James Sims never came to the job while he was liaison; and that he knew of nothing Sims did for the $15,000 salary, except come to the company's office in New Rochelle for his check every Friday afternoon. (Tr. 3593-95; GX 44).

9. Additional Testimony of Fruto Alicea.

Fruto Alicea was introduced to Munoz in 1971 by James Sims, whom he had known for many years, and who in 1971 was employed by the Hunts Point Community Corporation. In 1972, Munoz hired Alicea as a

bilingual instructor for the Hunts Point Community Corporation. Alicea, however, did not act as a bilingual instructor. Munoz and Sims told him that his job was to go on assignments as directed by them and that his hours would be flexible. (Tr. 141).

While on the Hunts Point Corporation payroll, Alicea attended meetings of the Council of the Black and Puerto Rican Coalition of Construction Workers, an organization founded by Munoz, of which James Sims was the director. (Tr. 44-53). His first assignments for the Coalition were to lead demonstrators onto construction sites and try to stop the work until the contractors agreed to meet with Sims or other council members. (Tr. 56). Not long after he was directed by Munoz to go on assignments at night with James Sims which involved planting pipe bombs on construction sites and burning trailers. For each of these assignments he received a bonus payment of $200 to $300. (Tr. 56-205). The principal incidents of pipe bombings and arson have been set forth above in connection with the events relating to each contractor.

Alicea also described meetings of the Coalition, and of the Council of the Coalition, a smaller group which consisted of Munoz and Sims and other leaders of the Coalition. (Tr. 204-08). During these meetings James Sims stated that the liaison job was the means to get money for the council members. "They didn't have to report to work or anything. They just picked up their checks. . . ." (Tr. 209, 204-13).

10. Testimony of Migdalia Ortiz.

Migdalia Ortiz testified she had known James Sims since November, 1971. In March, 1972, he started living with her in her apartment at 2347 Tiebout Avenue. (Tr. 1283-85). She had conversations with Sims about his work for the Hunts Point Community Corporation and for the Black and Puerto Rican Coalition. He spoke to

her about demonstrations on construction sites ordered by Robert Munoz and told her that the purpose of the demonstrations was to send demonstrators onto the site, stop the work, damage property and show their strength. (Tr. 1297).

She also learned from James Sims and from Fruto Alicea, who frequently came to her apartment with Sims, about incidents involving planting pipe bombs and burning construction sites. On two occasions Ortiz went with James Sims and Alicea to a construction site at night and waited while they planted a pipe bomb or lit a fire on construction equipment. (Tr. 1310-35).

During 1973, Ortiz discovered hand grenades, bombs and gasoline cans stored by Sims and Alicea in her apartment. (Tr. 1345-57). Sims also told her that Munoz and he had formed a guard service and that they forced contractors to hire their guards by stealing and destroying proper[illegible]men using arson and bombings to give the contractor no choice but to hire them. (Tr. 1376-77).

11. Other Witnesses.

Other Government witnesses included Warnell Vega, who described Council meetings of the Coalition which he attended (Tr. 3659-73), and Estelle Fernandez who worked as a secretary to Munoz at Hunts Point, participated in demonstrations and at Munoz' direction, committed acts of violence, including fire bombings, against stores and other businesses.* (Tr. 3785-3833).

The Government also called Carlos Cuadrado, who said he was a member of the Council of the Coalition and described conversations he had had with James Sims, Eddie Jackson and Cleo Williams about incidents at con-

* This testimony was introduced against Munoz and James Sims only as evidence of similar acts.

struction sites. He testified that Sims told him that he had placed a pipe bomb on a crane at the construction site at 149th Street and Morris Avenue. (Tr. 4078-98). Cuadrado also testified that he worked at the Hunts Point Community Corporation as a job developer from 1968 to November, 1973, while Munoz was director of the corporation, and presently works for Munoz, who is the Executive Director, at SERA, a drug treatment program. (Tr. 4077-79). On cross-examination by Munoz' counsel, Cuadrado said that Munoz never discussed with anyone placing a bomb or starting a fire. (Tr. 4098-4100).

The Government also called police witnesses and representatives of the New York City Police Department bomb squad. Members of the bomb section introduced unexploded pipe bombs and fragments of bombs which had been recovered from the construction sites included in the testimony. These bombs were essentially similar in design—aluminum pipes with caps at each end, one cap with a hole in it through which the fuse protruded, cardboard wafers inside the pipe to pack the powder, a piece of threaded nipple piping inside the pipe to act as shrapnel, and smokeless powder inside the pipe. (GXs 1, 49, 50, 51, 52, 53, 54, 55, 57 and 58; Tr. 4488-4507, 4522-29, 4543-50, 4590-97, 4603-10, 4615-35, 4657-70, 4672-74). Detective Kenneth Dudonis, of the Bomb Section, testifying as an expert, stated that except for the bombs from the construction sites included as exhibits in the Government's proof, he had in his experience not seen any other aluminum pipe bombs, or pipe bombs with threaded-nipple piping inside as shrapnel or with similar cardboard wafers to pack the powder inside the pipe. (Tr. 4622-24).

The Defense Case

Robert Munoz was the only defendant who testified. After describing his personal and employment history, he denied ever discussing bombing or planning of bombings or arsons, or directing the placing of any bombs or arsons, with any defendant. (Tr. 5099). He stated that he participated in organizing the Black and Puerto Rican Coalition of Construction Workers, but claimed that the sole purpose of the construction site demonstrations was to obtain jobs for unemployed persons from the neighborhoods in which the projects were being built. (Tr. 5100-01).

On cross-examination, Munoz claimed that the money paid by the contractors for the liaison men was used by the Coalition to pay for shoes, food and transportation for the demonstrators. (Tr. 5237).

Munoz also called a series of character witnesses including Howard Samuels, State Senator Joseph Galiber and Cesar Chavez who testified to Munoz' good reputation for truthfulness and peacefulness. (Tr. 4897-4900, 4953-56, 5191-96).

James Sims called as witnesses his mother and sister as well as seven members of the Coalition who testified that they had received jobs through the efforts of the Coalition. (Tr. 5597-5716).

ARGUMENT

POINT I

There was ample evidence to support the convictions of Munoz and Sims.

Munoz and Sims contend that the evidence at trial was insufficient to convict them of conspiracy. The contention is meritless, as Judge Motley found when she denied defendants' motions for acquittal at the conclusion of the Government's case. (Tr. 4798-4809, 4839-40 [Sims]; 4810-33, 4840-41 [Munoz]).

Munoz virtually concedes—as he must in view of the evidence*—that if Alicea, the principal witness against him, were believed by the jury, then no claim concerning sufficiency of the evidence could fairly be raised. He argues, however, that Alicea's testimony must be completely discounted by this Court, because Alicea admitted participating in the crimes himself and had been discharged by Munoz from his job at the Hunts Point Community Corporation, and because the jury acquitted the defendants on the substantive counts.

Munoz entirely ignores well-settled principles establishing that, once a jury has evaluated the Government's proof and unanimously rejected the arguments of defense counsel, the evidence must be examined in the light most favorable to the Government, and that this Court does

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* Alicea's testimony was devastating to Munoz. He testified that on one occasion, Munoz gave Sims a pipe bomb to plant at the Sovereign site. (Tr. 99). On numerous occasions Munoz sent Alicea on assignments with Sims, where Sims and Alicea planted pipe bombs and set fires on construction sites. (Tr. 59, 71, 98-99, 111, 134, 142, 156). Routinely, the morning after the bombing or arson, Alicea and Sims reported back to Munoz. (Tr. 64-68, 115, 128-29, 162).

not sit as a "super jury" to which counsel may address an appellate summation. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972); *United States* v. *Tadio*, 223 F.2d 759 (2d Cir.), *cert. denied*, 350 U.S. 874 (1955). An appellate court must give "full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *United States* v. *Harris*, 435 F.2d 74, 88 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971); *Curley* v. *United States*, 160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). See *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir. 1974).

With these principles in mind, the poverty of Munoz' claim is readily apparent. That Alicea was an accomplice with possible motivations to fabricate testimony was a fact placed before the jurors for their consideration, and quite obviously rejected by them in large part. The fact that the jury returned not guilty verdicts on the substantive counts may indicate nothing more than that, in reaching their verdict, the jurors felt that a conviction on only one count was sufficient to vindicate the public's interest in enforcement of the law. *See United States* v. *Maybury*, 274 F.2d 899, 902 (2d Cir. 1960). But even if the jurors had sufficient doubt concerning the reliability of Alicea's testimony about each of the specific instances of bombing or extortion sufficient to lead to acquittals on the substantive counts, that did not require them to reject the cumulative force of Alicea's testimony about the incidents in finding Munoz guilty of conspiracy. Indeed, it is well settled that an acquittal on a substantive count does not preclude reliance by the jury upon the testimony relevant to that count in assessing the sufficiency of the evidence adduced as to a conspiracy count. See *United States* v. *Lubrano*, 529 F.2d 633, 636 n.1 (2d Cir. 1975); *United States* v. *Zane*, 495 F.2d 683,

690-93 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974); *United States* v. *Sisca*, 503 F.2d 1337, 1344 n.9 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974).

Munoz contends further that the other inside witnesses and construction company witnesses did not incriminate him. This contention ignores the extensive testimony set forth above in the "Statement of Facts." Construction witnesses from Sovereign (Tr. 1968), Montana (Tr. 3490-91, 3503-10), Slattery (Tr. 3319) and Mars-Normal (Tr. 3590-91) testified about meetings they attended with Munoz where Munoz made demands of them to hire specified subcontractors or unwanted liaison men and accompanied the demands with direct and indirect threats. The fact that Munoz' meetings with the contractors and his demands immediately preceded or followed bombings and arsons is additional strong circumstantial evidence of Munoz' involvement in the incidents. Furthermore, Munoz testified on his own behalf and was subject to extensive cross-examination concerning especially his control over the money payments received by Coalition. The jury was entitled to consider and disbelieve his testimony on this subject in convicting Munoz. See *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 n.7 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States* v. *Arcuri*, 405 F.2d 691, 695 n.7 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969).

The testimony as to Sims' personal participation in the bombings and arsons, in violent demonstrations and in making direct and indirect threats to contractors in connection with demands for the hiring of liaison men was likewise overwhelming as the "Statement of Facts" makes abundantly clear.

POINT II

The Government acted properly in calling Cuadrado to testify at trial.

Munoz and Sims allege that the Government called Carlos Cuadrado to testify as a witness knowing he would commit perjury. This contention is baseless.

The law is clear that to prevail on such a claim the defendants must show not only that the Government called a witness who perjured himself in a manner that affected the outcome of the trial, *United States ex rel. Washington* v. *Vincent*, 525 F.2d 262, 267 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3473 (Feb. 23, 1976), but also that the Government either intended the witness to give perjurious testimony or knew that he did so without making that fact known. *Napue* v. *Illinois*, 360 U.S. 264, 265 (1959); *Giglio* v. *United States*, 405 U.S. 150, 154 (1974). The absurdity of defendants' claims is evident from their inability to show any of these facts.

Neither Sims nor Munoz cites a single piece of direct testimony by Cuadrado even alleged to be false or which the Government knew to be false, nor does either of them point to any proof or even make an offer of proof that would tend to make such a showing.*

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* The only factual claim of actual perjury at trial advanced by Sims and Munoz is that Cuadrado failed on cross-examination to identify his own voice on a tape recording produced by the defense. (Tr. 57). Whatever the basis of Cuadrado's testimony, it is crystal clear from the circumstances that the perjury — to the extent it was perjury — was not at the behest of or within the knowledge of attorneys for the Government. Indeed, since the tape recording was in the possession of defense counsel, there was no way the prosecutors could have anticipated Cuadrado's response.

Each point in Cuadrado's direct testimony as to James Sims was independently corroborated by other witnesses. His statements as to the organization (Tr. 4078-81) of the Council of the Black and Puerto Rican Coalition were undisputed and confirmed by Vega, Alicea and Munoz. His testimony as to the bombing of the crane on the 149th Street site (Tr. 4084-85) was corroborated by Alicea. (Tr. 98-115). The testimony about Amengual and Sims (Tr. 4085-87) was confirmed by Amengual. (Tr. 2902-09). Cuadrado did not incriminate Munoz on direct examination and in fact exculpated him on cross-examination. Indeed, with respect to Cuadrado's testimony about Munoz on cross-examination, appellate counsel for Munoz, who also represents Sims on this appeal, claims not that Cuadrado's testimony was false, but that it was truthful and that the Government improperly impeached that portion of Cuadrado's testimony.* This claim is not only squarely refuted by this Court's decision in *United States* v. *Jordano*, 521 F.2d 695 (2d Cir. 1975), but also shows the hollowness of the claim presented in the same brief that Cuadrado's testimony was perjurious.

Finally, the statement to the jury by the District Court that Cuadrado's testimony was unworthy of belief had no bearing on the propriety of Cuadrado's being called as a witness, particularly since the Judge instructed the jurors that the ultimate determination of Cuadrado's credibility was exclusively within their province. Indeed, in response to the appellants' post-trial motion asserting the same point raised here, the District Court noted, in a written memorandum included in the appendix filed by Sims and Munoz:

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* At trial during cross-examination, Munoz was asked his opinion as to the truthfulness of Carlos Cuadrado, and he stated, "If I could understand him all the time I would say he spoke the truth." (Tr. 5443).

> "More importantly, however, defendants have not established that the prosecutors *knew* either that Cuadrado *would* commit perjury at trial or that he *was* presently perjuring himself at trial. While the prosecutors were aware that Cuadrado had initially testified falsely before the grand jury they were also aware that he had admitted his perjury and had then testified further before the same grand jury. The Government was entitled to rely on this testimony, which had been corroborated in part by other witnesses, in deciding to call Cuadrado as a witness at trial. *See United States* v. *Jordano*, 521 F.2d 695, 697 (2d Cir. 1975)." (App. 267a-68a).

This conclusion was unquestionably correct, and was fully supported by the record, which establishes that while Cuadrado initially provided false testimony before the Grand Jury, he subsequently admitted that perjury and then agreed to cooperate with the Government.* While Sims and Munoz see fit to accuse the Government's attorneys in this case of the crime of subornation of perjury (Brief at 56), nothing in their brief or in the record of this case even suggests that such was the case. This claim is utterly baseless.

POINT III

The prosecution's use of leading questions in its examination of various witnesses before the grand jury was wholly proper.

Appellants Munoz and Sims contend that the prosecution employed a "calculated pattern" of leading questions in its examination of "key witnesses" (Brief at 59)

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* In addition, Cuadrado was indicted for perjury before the grand jury; this indictment was subsequently dismissed when Cuadrado pleaded guilty to one count of this indictment.

before the grand jury, which was designed to, and did, elicit from one of those witnesses testimony the prosecution knew to be "misleading and perjurious" (*ibid.*), and that this fraud on the grand jury by the prosecution requires dismissal of the indictment. Appellants' ill-considered contention is false and thoroughly devoid of merit. Judge Motley's rejection of the claim below was entirely correct. (App. 269a-70a).

First, while the prosecution made extensive use of leading questions in its grand jury examination of a number of "insider," co-conspirator witnesses, it was entirely proper for it to do so. The limitations imposed by Rule 611(c) of the Federal Rules of Evidence on the use of leading questions during direct examination at trial are, under Rule 1101(d)(2) of those same Rules, explicitly made inapplicable to grand jury proceedings. Indeed, the inapplicability of the Rules of Evidence to grand jury proceedings, which are, of course, *ex parte* in character, is simply an incident of the wide latitude historically accorded grand jury investigations, *In Re Millow*, 529 F.2d 770, 774 (2d Cir. 1976), and of the well-settled rule that an indictment, if valid on its face, is enough to call for a trial on the merits. *Costello* v. *United States*, 350 U.S. 359 (1956). Accordingly, a grand jury may rely on hearsay or otherwise incompetent evidence, where the nature of the evidence is revealed to the grand jurors, *id;* and it may even ask questions based on evidence seized in violation of the Constitution. *United States* v. *Calandra*, 414 U.S. 338, 349-52 (1974) (Fourth Amendment); *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966) (Fifth Amendment).

Second, appellants' accusation that the prosecution interrogated Fruto Alicea in the grand jury by means of leading questions in order to secure what it knew to be perjurious testimony is wholly unsupported by the facts

and false.* Appellants Munoz and Sims, of course, do not attack the substance of Alicea's grand jury testimony inculpating them Indeed, they do not even claim that the dates and times of the events in issue, about which Alicea testified before the grand jury and at trial, are in truth different from those to which Alicea attested by his affirmative responses to the prosecutor's leading grand jury questions. This is hardly surprising, given the grand jury and trial testimony of the numerous construction company employees and officials regarding the dates and times of the pertinent bombings, arsons, take-overs and acts of vandalism at their respective construction sites —all of which substantially corroborated Alicea's testimony, including that of the specific dates and times, of these same events.

Appellants' claim, then, is no more than, at best, that Alicea, in acknowledging the dates and times suggested in the prosecutor's leading questions, may have provided the grand jury with an impression of his power to recall those precise dates and times which exceeded his actual ability to do so. Here, however, whatever Alicea's true ability while in the grand jury to recall the specific dates and times in issue, the accuracy of the dates and times he did acknowledge was firmly corroborated by the government's other proof and is not now disputed. The unsupported claim, in these circumstances, that the prosecutor used leading questions in an intentional and successful effort to secure what he knew to be false and perjurious testimony is simply frivolous.

Finally, it is crystal clear that even apart from the challenged grand jury testimony of Alicea, there was more than "sufficient, legal and probative evidence" to warrant

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* Although appellants object generally to the use of leading questions in the grand jury to question other "inside" witnesses, Migdalia Ortiz, Estelle Fernandez, Warnell Vega and Carlos Cuadrado (Brief at 60), they do not claim that the grand jury testimony of any of these other witnesses was perjurious.

the indictment of both Munoz and Sims, and that, accordingly, appellants' claims should be rejected. *United States* v. *James*, 493 F.2d 323, 326 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974). Indeed, Sims' indictment preceded Alicea's grand jury testimony and was premised on the abundant testimony of the construction company employees and officials which thoroughly implicated him in the conspiracy. Similarly, although Munoz' indictment was returned after Alicea's testimony, it too was supported by more than ample other evidence in the form of the testimony of other "insider" and construction company witnesses. (See, *supra* p. 23).

POINT IV

The Government did not make improper use of the grand jury.

Munoz and Sims contend on appeal, as they did before the District Court, that the Government was guilty of misconduct in calling Migdalia Ortiz and Warnell Vega to testify before a grand jury after the Munoz indictment had already been filed. They claim that the indictment should be dismissed or a new trial granted, because the sole purpose of calling the witnesses before the grand jury was to freeze their testimony for later use at the Munoz trial. These claims are without merit as Judge Motley found after a hearing at which the Assistant United States Attorney who presented the case to the grand jury testified.

The facts relating to the grand jury testimony of Ortiz and Vega are set forth in detail in Judge Motley's thorough and well reasoned opinion dated March 23, 1976 on which we place primary reliance. (App. 248a-66a, opinion pp. 1-19). Briefly, the *Munoz* indictment, 74 Cr. 1168, was filed on December 11, 1974, by a special

grand jury which was dismissed at the end of its lawful term on December 26 1974. Ortiz testified before a new grand jury on December 27, 1974, and January 3, 1974. Vega testified before the same grand jury on December 30, 1974.

Kenneth Feinberg, the former Assistant United States Attorney who supervised the grand jury investigation in this case, testified at the evidentiary hearing as to his purpose in calling both Ortiz and Vega to testify. He testified that he heard of Ortiz' existence for the first time on December 3, or 4, 1974, when her name was brought to his attention by Fruto Alicea, who had begun cooperating with the Government at the end of November, 1974. Alicea told Mr. Feinberg that Ortiz might have information about persons involved in the bombings. (Tr. 2631-35). On December 11th, when the indictment was voted, Alicea was immediately placed into the Government's witness protection program, because Mr. Feinberg believed that when the indictment became public, the fact that Alicea was cooperating with the Government would become known to the defendants. Mr. Feinberg was also concerned that if he put Ortiz in the grand jury, it would be a tipoff to the defendants that Alicea was cooperating. Therefore, it was not until Alicea was in protective custody and unavailable for any reprisals that Ortiz could be subpoenaed. (Tr. 2635-38).

Beginning December 11th and continuing for the next eight or nine days, while in protective custody, Alicea was debriefed extensively by federal agents and New York City police assigned to the investigation. During the debriefing, Alicea provided information about various individuals not yet indicted who had been targets of the investigation for over a year. Upon completion of the debriefing, Mr. Feinberg decided to place Ortiz in the grand jury hoping that she could provide further information about the other targets of the investigation not yet indicted, and also about a possible obstruction of justice charge.

On December 27, 1974, Ortiz was called to the grand jury. Prior to her appearance, Mr. Feinberg spoke to her for only two or three minutes. During the course of her testimony, after introductory warnings and questions, Ortiz indicated that she would refuse to answer questions based on her Fifth Amendment privilege. Mr. Feinberg indicated to her, since she was not a target of the investigation, that the Fifth Amendment was purely personal, and she thereafter answered some questions. These questions were designed to determine whether she was going to be a truthful witness, and covered material already known by the Government and included in the existing indictment. From Ortiz' answers to those questions, Mr. Feinberg determined that she was lying, was not going to be truthful and was not cooperating, and he therefore stopped questioning her so as not to reveal to her the names of any of the Government's other targets in the investigation. (Tr. 2639-45).

After Ortiz left the grand jury, Mr. Feinberg spoke to her. He told her he thought she had committed perjury and suggested she consider whether she wanted to cooperate. A few days later, Ortiz did decide to cooperate and was debriefed by Mr. Feinberg and the agents. During this debriefing, Mr. Feinberg determined that Ortiz had no information about other targets of the investigation not already under indictment and decided that no beneficial purpose would be served by questioning her again before the grand jury, except to allow her to recant the testimony she had given at her first appearance. Thus, Ortiz' second appearance on January 3, 1974, served only to provide her with an opportunity to recant, which she did. (Tr. 2645-47).

After listening to Mr. Feinberg's testimony, extensive argument by the parties, and reviewing the grand jury

minutes, Judge Motley found that the former Assistant's testimony concerning the reasons for calling Ortiz for her first appearance other than merely to attempt to freeze her testimony were "certainly credible and reveal no impropriety." (App. 261a, opinion, p. 14). The court further found as to Ortiz' second appearance that the Government's position—that Ortiz was called to be given an opportunity to recant her previous perjurious testimony—was fully supported by Mr. Feinberg's testimony. The Court also affirmatively found that the policy of the recantation statute, 18 U.S.C. § 1623(d), would be served by such an appearance. (App. 261a, opinion, p. 15). These findings by Judge Motley, who had a full opportunity to judge the credibility of the witnesses at the hearing, are, we submit, entirely correct and, in no event, can be said to be clearly erroneous.

Defendants also argue, as they did below, that calling Warnell Vega before the new grand jury on December 30, 1974 after the Munoz indictment was voted was improper. This argument is also without merit, as Judge Motley found.

On July 30, 1974, Vega testified before the original grand jury that voted the Munoz indictment and, during that appearance, perjured himself. He was indicted for perjury in Indictment 74 Cr. 1009 on October 29, 1974, the indictment to which he subsequently pled guilty in 1975. The Government contended that Vega's grand jury appearance after the indictment was to allow him to recant his earlier perjured testimony.

Although concerned that the recantation argument was harder to maintain for Vega than for Ortiz, Judge Motley ruled that the court did not find, "as a matter of fact, that recantation was not a major purpose of Vega's December 30, 1974, appearance before the grand jury," nor

that "the purpose of the recantation statute could not have been served by Vega's appearance before the grand jury under these circumstances." (App. 265a, opinion, p. 18). The Court further found that questions addressed to Vega concerning additional persons not indicted showed that "it is at least arguable, from the transcript, that the Government was interested in obtaining information about them for possible prosecution." (App. 265a, opinion, p. 18). As with Ortiz, the Court's findings as to Vega certainly are correct and, by no stretch of the imagination, can be viewed as clearly erroneous.

Having ruled that freezing testimony in preparation for trial was "neither the sole or the dominating purpose" of Ortiz' or Vega's grand jury appearances (App. 258a, opinion, p. 11 [Ortiz]; App. 266a, opinion, p. 19 [Vega], Judge Motley found it unnecessary to reach the additional questions (1) whether the defendants had standing to raise this claim, (2) if so, whether the appropriate remedy for misuse of the grand jury would be to suppress the trial testimony of the witness or only the witnesses' grand jury testimony, and (3) finally, whether, in any event, the defendant suffered any prejudice.

Since it is unclear whether the rights abridged by a post-indictment misuse of the grand jury are those of the witness or the defendant, it remains unclear whether a defendant has standing to complain, *cf. Alderman* v. *United States*, 394 U.S. 165 (1969), though at least one opinion of this Court suggests, without specifically addressing the issue, that a defendant may be possessed of standing. *United States* v. *Fahey*, 510 F.2d 302, 306-07 (2d Cir. 1974).

Secondly, even if a defendant is possessed of standing, and the grand jury is misused, it is unclear whether the remedy should extend beyond the suppression of the witness' grand jury testimony to the witness' trial testimony.

Because misuse of the grand jury will most likely involve an attempt to "freeze" the testimony of a witness, it is difficult to see why the appropriate remedy should require anything more than suppression of the testimony provided to the grand jury. And since there was no use by the Government of the grand jury testimony of Ortiz or Vega, nor any showing that Ortiz' or Vega's decision to testify for the Government had anything to do with their appearance in the grand jury, the defendants have no grounds for complaint.

Finally, it is difficult to see what possible prejudice the defendants suffered. There is no showing that the testimony of Ortiz or Vega was vital to their convictions. Vega's testimony was inconsequential.* Ortiz did not incriminate Munoz at all,** and in view of the overwhelming evidence against James Sims, the addition of her testimony, was, if error, harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967).

POINT V

The denial of Cuadrado's motion to disqualify the sentencing judge was proper.

Cuadrado was named as a defendant in *United States* v. *Munoz, et al.*, 74 Cr. 1168. The indictment was filed on December 11, 1974, and assigned to Judge Motley. On December 20, 1974, Cuadrado pled not guilty to the indictment, but on January 7, 1975, he withdrew his

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* As defendants point out in their brief on the sufficiency argument on Point One, "Vega did not inculpate Munoz in his testimony." (Brief at 52).

** The defendants' brief states: "Ms. Ortiz stated that she never met Munoz at any of the meetings at her apartment or had any direct dealings with him." (Brief at 52).

plea of not guilty and entered a plea of guilty to Count One.

Cuadrado was called by the Government as a witness at the present trial, and testified on November 12 and 13, 1975. During cross examination of Cuadrado, Judge Motley in a robing room conference with counsel expressed the view that "I think this jury is convinced that this witness is not to be believed with respect to anything he says." (Tr. 4408). Judge Motley further stated that "I will give them my view of his testimony [in the charge]. They aren't bound by it." (Tr. 4408-09).

Later, in the charge to the jury, Judge Motley stated:

> "In my view, the testimony of the witness Carlos Cuadrado is completely incredible, that is, unbelievable, and should not be accorded any weight; but, as I noted before, you are not bound to accept my view of his testimony and must arrive at your own decision as to whether his testimony is to be accorded any weight and whether you believe his testimony or not." (Tr. 6400).

On January 7, 1976, after the conclusion of the trial and prior to Cuadrado's sentencing date, Cuadrado's attorney moved to have Judge Motley disqualify herself from imposing sentence. This motion was denied by Judge Motley in a written opinion dated January 8, 1976.

Cuadrado claims that the denial by the District Court of his motion for Judge Motley to disqualify herself at the time of sentence was error. He asserts that the comments of the judge in her charge concerning Cuadrado's testimony as a witness during trial against Cuadrado's co-defendants, considered together with the Government's statement at sentencing that Cuadrado's

testimony to Munoz was a sham, show that the Court was biased and prejudiced against him. This contention is frivolous. Judge Motley's decision not to disqualify herself, as set out in her written opinion, is entirely correct.

The facts as set forth in the motion and the brief filed by Cuadrado refer only to the judge's comments at trial that Cuadrado's testimony was not credible. As Judge Motley concluded, these remarks were based solely upon her participation at the trial and not upon any extra-judicial source of information. *See Wolfson* v. *Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968). The district judge thus ruled that since the affidavit had not even suggested personal bias of extrajudicial origin, the motion was insufficient as a matter of law. Opinion page 4.*

In *United States* v. *Sclafani*, 487 F.2d 245, 255 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973) this court in interpreting Section 144 of Title 28, United States Code,** said:

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* This opinion appears in neither appendix filed by appellants. Should the court desire, copies are available from the Government.

** 28 U.S.C. § 144 provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel or record stating that it is made in good faith."

> "Disqualification is warranted and appropriate *only* if the alleged bias and prejudice stems from an extrajudicial source and has resulted in the formulation of an opinion on the merits *not based upon what the judge has learned by his participation in the proceedings before him* — a situation totally absent here. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966). [emphasis added]

This Court has recently noted, with respect to a claim similar to that presented here, "The rule of law . . . is that what a judge learns in his judicial capacity . . . is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification." *United States* v. *Bernstein*, ——— F.2d ——, Dkt. No. 74-2328, slip op. 6631, 6644 (2d Cir. March 4, 1976). See also *Hodgson* v. *Liquor Salesmen's Union*, 444 F.2d 1344, 1348 (2d Cir. 1971); *Rosen* v. *Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966).

The propriety of comments by a presiding judge on the evidence adduced during a trial has long been recognized and accepted, *Quercia* v. *United States*, 289 U.S. 466 (1933); *United States* v. *La Vecchia*, 513 F.2d 1210, 1214 (2d Cir. 1975); *cf. Mazique* v. *Mazique*, 356 F.2d 801, 803 (D.C. Cir.), *cert. denied*, 384 U.S. 981 (1966), and, in any event, the comments could only have affected those defendants on trial, not Cuadrado. Thus, the only issue is whether those remarks indicated such a personal prejudice or bias as to require this court to remand for resentencing. Judge Motley's comments, which were made in a proceeding to which Cuadrado was not then an immediate party and which were fully based upon the record before her, simply do not warrant disqualification.

POINT VI

The imposition of sentence on Cuadrado was entirely proper.

Cuadrado was convicted upon his guilty plea to a charge of conspiracy in violation of Title 18, United States Code, Section 371 and was sentenced to a term of five years imprisonment. He appeals from the sentence imposed by the District Court on the grounds that the imposition of this sentence was based upon materially false assumptions or inaccuracies. Consequently, he asks this court to vacate that sentence and remand the case for resentencing. This contention is entirely lacking in merit.

This circuit has followed the well-established rule stated in *United States* v. *Tucker*, 404 U.S. 443, 447 (1972), that "a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review." *United States* v. *Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975); *United States* v. *Tramunti*, 513 F.2d 1087, 1120 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973); *United States* v. *Sweig*, 454 F.2d 181, 183-84 (2d Cir. 1972); *McGee* v. *United States*, 462 F.2d 243, 245 (2d Cir. 1972); see also *Dorszynski* v. *United States*, 418 U.S. 424, 441 (1974). Only upon showing that the judge relied on constitutionally impermissible factors or material inaccuracies will an imposed sentence be reviewed. *United States* v. *Brown*, *supra*, at 1172; *United States* v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970); *United States* v. *Mitchell*, 392 F.2d 214 (2d Cir. 1968). Cuadrado has simply not met his burden of showing that there were material inaccuracies upon which the judge relied in imposing sentence. *United States* v. *Rollerson*, 491 F.2d 1209, 1213 (5th Cir. 1974). Although a judge is generally under no obligation at the time of sentencing

to state his reasons for imposing a sentence, *McGee* v. *United States*, *supra*, at 247; But see *United States* v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974), Judge Motley's explicit statements concerning the grounds for imposition of the sentence clearly show a proper basis for the sentence.*

Cuadrado in his brief (at 12) cites a portion of the sentencing transcript that he claims supports his contention. However, viewing the minutes as a whole, it is entirely clear that the sentence was based upon entirely proper factors. Judge Motley emphasized that the sentence was based on (1) Cuadrado's extensive prior criminal record, (2) the negative character of his cooperation with the Government, (3) the suspended sentence received on a prior conviction in the Bronx, and (4) the severity of the crime charged in the indictment to which he pleaded guilty.

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* "The Court: All right.

It is the judgment of the Court that the defendant be sentenced to a term of five years. That is in view of your extensive criminal record, Mr. Cuadrado. [And] *as far as the cooperation with the Government, we've just gone over that.*

So that *the Court can't agree that you gave any cooperation to the Government that was worth anything in this case.*

It [also] appears, as I indicated, that you were given a suspended sentence in the Bronx without that Court having the benefit of your extensive criminal record in Puerto Rico.

Mr. Zapata: Your Honor, may I speak on that?

I was not his attorney at the time, but I'm familiar with cases in the Bronx and in the whole City of New York. I've represented many clients in the Bronx who took a plea and were convicted.

The Probation Department gets records regularly from Puerto Rico. They either get them through the FBI or they write directly to the Department of Justice in Puerto Rico and get them.

[Footnote continued on following page]

Indeed, Cuadrado does not now dispute, except in the most conclusory terms, the factual accuracy of any of the information upon which Judge Motley explicitly relied. Rather, he claims that she was misinformed about what a state judge had considered during a prior sentencing hearing after which Cuadrado received a suspended sentence in an unrelated case. Defense counsel was not only allowed the "verbal explanation or comment" required by this Court's decision in *United States* v. *Rosner*, 485 F.2d 1213, 1230 (2d Cir. 1973),

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In all likelihood they did have this record. You would have to go into the actual background of the case to see why the District Attorney felt and the Court felt that this was a proper sentence. This is what I think happened in this case, that there were mitigating circumstances.

The Court: I don't know what happened, but it just impressed me that the Court probably didn't have that, because the presentence report reiterates the fact that these Puerto Rican convictions did not appear on his FBI rap sheet, as it is called.

So the chances are they didn't have that in the Bronx when he was sentenced in 1970. The Probation Officer and the Government here has said that they didn't have it—is that so? — when he testified for the Government?

Mr. Harris: That is so, your Honor.

Mr. Zapata: I have had many defendants who took pleas in the Bronx or were convicted whose records were imcomplete, and they obtained—

The Court: But *aside from that*, the defendant is sentenced to five years because, as I've indicated, *he has an extensive criminal record which involves carrying a weapon.* He has admitted to carrying a gun in addition to a knife, and he was previously convicted in the Bronx of having a gun which went off in a struggle, and he has served time before for major crimes.

His cooperation with the Government was nil in this case and —

Mr. Zapata: I take issue with that, Your Honor..." (Sentencing Minutes, at 30-32) (emphasis supplied).

cert. denied, 417 U.S. 950 (1974), but actually pointed out his view of what the state court judge had before him. Judge Motley then stated that the sentence was imposed "aside from that." Finally, of course, the issue of what another judge considered in imposing another sentence is totally collateral to the issue of a proper sentence in this case and emphasizes the wisdom of this Court's observation that "[n]ot every defect in the sentencing process . . . is of constitutional dimension." *United States* v. *Malcolm*, *supra*, 432 F.2d at 816. In any event, even assuming the validity of the factual claim raised by Cuadrado, that claim was so collateral that it could not render the foundation of the sentence imposed "so extensively and materially false" that the actual sentence is invalid. *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948).

The record is clear that the District Court neither stated any material inaccuracy, nor relied upon any factual error in imposing sentence on Cuadrado. Further, since the bases for the sentence noted by the Court were entirely proper, this Court need not and should not look behind the sentence to second-guess the District Court's decision. *United States* v. *Herndon*, 525 F.2d 208, 209 (2d Cir. 1975).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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Form 280 A. -Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Peter J. Fitzpatrick being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the **29th** day of **June, 1976** he served a copy of the within by placing the same in aproperly postpaid franked envelope addressed:

Murray Richman, Esq.
1930 Grand Concourse
Bronx, N.Y. 10457

Manuel Nelson Zapata, Esq.
277 Broadway
New York, N.Y. 10007

And deponent further says that he sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York

Peter J. Fitzpatrick

Sworn to me before this
29th day of June, 1976
Olga C. Grampp

OLGA C. GRAMPP
Notary Public New York State
No. 43-4620236
Qualified in Richmond Cty.
Comm. Expires March 30, 1977